Supreme Court, U. S.
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No. 80-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1402,

Petitioner,

v.

F. RAY MARSHALL, Secretary of Labor,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a non-onerous and reasonable rule, untainted by any evidence of discrimination, unfairness, or abuse, freely adopted (and revocable at any time) by the membership of a local union and requiring a candidate for local union office to evidence only a minimal interest in, and awareness of, union affairs as a demonstration of qualification for the responsibility of local union office is required to be invalidated by this Court's decision in *Usery* v. *Steelworkers*, 429 U.S. 305, as not being a "reasonable qualification" within the meaning of 29 U.S.C. Section 481(e), solely because only about seven percent of the membership have bothered to meet the requirement.

PARTIES BELOW

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REPORTED DECISIONS

The decision of the District Court for the Middle District of Florida, Tampa Division, is not reported, and the decision of the Fifth Circuit Court of Appeals is reported at 617 F.2d 96. Copies of each opinion are attached hereto in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Appeals for the Fifth Circuit, on May 14, 1980, issued a decision reversing and remanding for "further proceedings consistent with this opinion." Judgment was also entered on May 14, 1980.

Under the Rules of the Fifth Circuit Court of Appeals rehearings are substantially disfavored, and no application for rehearing was sought. This Court has jurisdiction to review the application for writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

APPLICABLE STATUTES AND REGULATIONS

29 U.S.C. Section 481 provides, in pertinent part, that:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to Section 504 of this title and to reasonable qualifications uniformly imposed) . . .

29 U.S.C. Section 482 provides, in pertinent part, that:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title. . .
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office . . .

The full text of the statutes is set forth in the Appendix.

The Secretary of Labor has promulgated regulations, and the regulations, found at 29 CFR Section 452.36-38, as they read at the time of the election and complaint, are set out in the Appendix at pp. 17a-21a.

Pertinent provisions of the local union by-laws are also set out in the Appendix at p. 22a.

STATEMENT OF THE CASE AND FACTS

Since at least 1972, Local 1402 of the International Longshoremen's Association has had a by-law requirement for nomination to office in the union, which required a member to have attended or have been excused from attending at least one of the regular meetings in each of the twelve months prior to the nomination. By-Laws, Article IX, par. 1(e). The requirement was freely adopted by the membership, and could be changed by the membership at any time. By-Laws, Article XX. Its requirements were well known, and no suggestion has been made that the purpose, application or enforcement of the rule was unfair, or was applied in any manner to infringe upon any rights of the membership. Under the operation of the membership rule, a member could be excused merely by prior notice to union officers that he would not be in attendance at that meeting.

During the period prior to the December, 1975 election, Local 1402 held two meetings each month except in the months of November and December of 1974. Since there was only one meeting in each of those months, each member was automatically credited with attendance for both months for purposes of the eligibility requirement.

In November, 1975, when nominations were held, only 6.3 percent of the members of the union had either attended or been excused from sufficient meetings to be eligible for nomination to office. After the election a

challenge was filed, and the Secretary of Labor investigated to determine whether there had been a violation of the Labor Management Reporting and Disclosure Act, and subsequently brought this action to set aside the election, pursuant to 29 U.S.C. Section 482(b).

Suit was filed in the U.S. District Court for the Middle District of Florida, Tampa Division. Local 1402 raised a number of factual and legal challenges to the application by the Secretary of Labor, including whether the Complainant had exhausted internal union remedies, had complied with the administrative prerequisites, whether the application was timely, and similar issues. None of those issues was resolved since the matter was determined by the District Court on Local 1402's Motion for Summary Judgment. The Court, reviewing the requirement, and the pertinent statutes and regulations promulgated by the Secretary of Labor, determined that the rule was reasonable, and dismissed the Complaint. A copy of the Final Judgment is in the Appendix at 8a.

The Secretary appealed to the Court of Appeals for the Fifth Circuit, urging that the District Court had erred, suggesting principally that the fact that 93 percent of the membership was ineligible for nomination to office conclusively established that the rule was "unreasonable" within the meaning of 401(e). The Fifth Circuit agreed with that position, and entered Judgment on May 14 as noted previously.

ARGUMENT

The position of the Secretary of Labor in this action, and implicitly approved by the panel of the Fifth Circuit Court of Appeals, was that a union eligibility requirement was *per se* unreasonable where the "effect" of it, in any given election, was to result in the disqualification of 93% of the union membership, without the neces-

sity of any inquiry as to the reason for the disqualification, its relationship to the legitimate needs and interests of the union or to the demands of union office, comparison of the particular qualification with the requirements generally prescribed by other labor organizations, or the degree of difficulty in meeting this qualification by union members.

The petitioner, Local 1402, ILA, and the District Court which initially dismissed this action, disagreed, finding that a reasonable inquiry was necessary into those factors, and that on balance, the minimal burden imposed upon members, their ability to qualify independently of any action of the organization, and the need to be able to determine the reasonableness of the rule in advance, rather than at the time of qualification, made the rule in question "reasonable" within the meaning of 410(e).

In this regard it should be noted that the Secretary's own regulations, 29 CFR Section 452.36, adopted pursuant to general authority under the Act, set out each of these qualifications as factors to be considered. While it is certainly tempting, as a matter of administrative convenience for the Secretary to be able to turn to a *per se* standard, and evaluate the facts as they appear at the time of the investigation, rather than at the time of adoption of the Rule, and without any evaluation as to the purpose of the Rule, the delegation of authority by the Congress was not so broad. As this Court noted in *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 US 463, 470-71, Congress

> . . . weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.

The Secretary urged below that the decision of this Court in *Steelworkers Local 3489* v. *Usery*, 429 U.S. 305

(1977) controlled, and mandated a *per se* application of an "effects" test. The Secretary's initial Brief to the Fifth Circuit, at page 10, states:

> The statement in *Wirtz* v. *Hotel Employees*, approved in *Steelworkers*, that a rule that disqualified 93% of the membership is hardly reasonable, should control without more.

The Secretary filed an amended brief inserting the words "in the circumstances here" between "should" and "control," but failed to discuss what those circumstances were. Accordingly, a fair conclusion may be drawn that the Secretary is urging, and the Fifth Circuit approved, a *per se* test which permits the Secretary to merely demonstrate a numerical disqualification, resulting in a conclusive presumption that the rule is unreasonable within the meaning of 401(e).

We respectfully disagree, and urge that this Court reconsider the position taken by the majority in *Steelworkers*, clarifying that decision to the extent that it suggests a blind adherence to a mechanical application of numbers, not predictable in advance, and which result in the invalidation of a presumptively reasonable rule, voluntarily adopted by the membership of the local union [1], where the member has it completely within his control to qualify or disqualify for union office, depending upon his own demonstrated interest in the affairs of the local union, and his attentiveness to reasonable time periods and notice requirements.

Unlike the provisions struck down in *Steelworkers*,[2]

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[1] The rule could also be rescinded by the membership, requiring only a majority of those in attendance at any given meeting. Bylaws of Local 1402, ILA, Article XX.

[2] The *Steelworkers* requirement comes from the International Union Constitution, rather than Local Union by-laws, so the local union was powerless to change the rule.

the excuse provision for members who do not attend union meetings is unlimited and consists of no more of a burden than having the member notify the union office prior to the meeting. There are no qualifications or conditions on the reasonableness of the excuse, and no authority in any officer or person to deny the member an excused absence, for purposes of this rule.

Even the Secretary's *current* regulations, 29 CFR Section 452.36 (1979[3]), provide for a number of factors to be considered in determining whether a "meeting attendance"[4] rule is "reasonable" under Section 401(e) of the Act. Those factors are:

> (1) The relationship of the qualification to the legitimate needs and interests of the union;
>
> (2) The relationship of the qualification to the demands of union office;
>
> (3) The impact of the qualification, in the light of the Congressional purpose of fostering the broadest possible participation in union affairs;
>
> (4) A comparison of the particular qualification with the requirements for holding office generally prescribed by other labor organizations; and
>
> (5) The degree of difficulty in meeting a qualification by union members.

We respectfully suggest that the intention of Congress, that the Secretary inquire the reasonableness of the Rule consistent with the concern to avoid interference with the internal affairs of the union, suggests that the Secretary, by regulation, has adopted a more prudent course

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[3] They are identical to the 1976 Regulations, in the Appendix.

[4] Because of the excuse provisions, it is a misnomer to call the rule in question a "meeting attendance" rule; rather, it is more in the nature of a "meeting awareness" rule.

than that espoused in his argument to the Court of Appeals. The net effect of the Secretary's argument and the Fifth Circuit's holding is to place the burden on the union to demonstrate the reasonableness of the Rule, rather than to require the Secretary to demonstrate that it is unreasonable. This intrusion does not sit well with this Court's prior admonitions to avoid substitution of the Secretary or the Court's judgment for that of the union membership.

This Court has previously suggested that review of the internal workings of unions was not contemplated by the Congress. As the Court noted in *Boilermakers* v. *Hardeman*, 401 U.S. 233, 244 (1971), in a case where a member brought an action against the union for damages arising out of his expulsion.

> We think that this is sufficient to indicate that Section 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members. And if a union may discipline its members for offenses not prescribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether a particular conduct falls within or without their scope. 401 U.S. 244-45.

While *Boilermakers* dealt with a different portion of the statute, the interests involved are surely equal to those raised herein. In *Boilermakers*, the member was seeking to vindicate his rights under Section 101 (29 U.S.C. Section 411, commonly referred to as the "Bill of Rights"), which we respectfully suggest is of at least equal significance in the promotion of union democracy as the right to nominate or be nominated for union office. Similar deference herein would suggest that the Secretary make more of a showing that the rule was unreasonable than merely that a substantial number of members failed to qualify, where such failures is a result of

things over which the member had complete control. This is not a case where the member was excluded or declared ineligible because he had not previously held office, *Wirtz* v. *Hotel, Motel and Club Employees Union*, 391 U.S. 492 (1968), or because of some other criterion whereby the union leadership retained power to grant or deny access to the nomination process. Here, in a very real sense, it is not the incumbent officers but is the individual member who has in his possession the "key to the courthouse." In such a case, the cavalier assertion that the large percentage of the membership which did not bother to qualify demonstrates the unreasonableness of the rule is insufficient.

The purpose of the rule is to encourage membership participation and awareness of union activities generally, instead of excluding such participation. The fact that about 93% of the membership were indifferent to such encouragement does not make the rule itself an unreasonable rule of exclusion. By looking through the wrong end of the telescope, the Secretary determined that because the rule demonstrates that only a limited number of members demonstrated concern, responsibility, or participation in their union, the rule is unreasonable. We are unable to see what is unreasonable about a rule which requires a prospective officer at least at one of the two monthly union meetings, either to attend or to notify the union that he will not, and cannot appreciate the sophistication of the Secretary's argument that since so many members were so indifferent to the meetings at and through which their union acts, there must have been something wrong with the rule.

The rule seeks to encourage broad participation by the membership, at least to the extent of acknowledging minimal awareness of the time of meetings, and as such, the number or percentage of members who do not "qualify" is more a measure of the lack of interest or

involvement, rather than any limitation imposed by the incumbents. Invalidation of the rule would likely discourage attendance and involvement to a greater, rather than lesser extent.

The Secretary argued and the Fifth Circuit apparently agreed that the high percentage of persons who did not meet the requirement showed the rule had such an "effect" as to make it an unreasonable requirement. It is submitted that such is a *post hoc* or "after this-therefore because of this" approach instead of an examination of the rule itself.

If the Court accepts the proposition announced by the Fifth Circuit, that this rule is unreasonable because its "effects" (as just defined) are unreasonable, then any union will be effectively discouraged from adopting *any* sort of membership qualification, since the union will have no way of knowing when or whether that rule will be challenged, based on the "effect" of that rule at any given election. We suggested below, and repeat here, that a rule might be found reasonable for six elections in a row, where the percentage of eligibility was sufficiently high to withstand scrutiny, but in the seventh election, merely because of substantial drop in attendance or notification at even one meeting, the rule could be declared unreasonable, and the election subject to being set aside by the Secretary.

Where the validity of the rule turns not on its reasonableness, but only on its "effect," it can only encourage irresponsible actions of union officers, since it discourages efforts to thoughtfully and responsibly adopt rules which seem to accomplish legitimate union objectives. Moreover, it deprives the membership of an assurance that the prospective candidates to whom they are asked to entrust the responsibility and property of their union have demonstrated at least a minimal ability to observe time and notice requirements. These are matters

which have tremendous impact and significance on the governance of the union, enforcement of its contracts, and compliance with local, state, and federal reporting and record keeping requirements. Failure to comply with these requirements can impose substantial harm or liability both to the union and the officer, and it does not seem unfair that a candidate be required to demonstrate some ability to conform his conduct to such guidelines. The Secretary's action, and the decision of the Court of Appeals has the direct result of prohibiting any such requirement, for no other reason than the lack of interest or awareness of an arbitrary proportion of the membership.

Such a proposition is manifestly "unreasonable," and we respectfully request that this Court take the opportunity to disavow such principles, and to the extent that a reading of *Steelworkers* suggested this Court's concurrence with them, clarify that decision to qualify the substantial factual basis for the decision in *Steelworkers*, including the substantially less liberal excuse requirements, the known probability that a percentage of members would be working, or otherwise unavailable to attend, and the other factual distinctions which permitted a prediction that that rule would result in a substantial disqualification.

CONCLUSION

For all of the foregoing reasons, petitioner Local 1402, International Longshoremen's Association, respectfully requests that this Court grant the application for certiorari, and upon review of this cause reverse the decision of the Fifth Circuit Court of Appeals, remanding the case to it with instructions to reinstate the Final Judgment of the District Court dismissing this cause.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-2338

F. RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

LOCAL 1402, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION OF TAMPA, FLORIDA AND VICINITY AFL-CIO,
Defendant-Appellee.

May 14, 1980

Appeal from the United States District Court for the Middle District of Florida.

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

The Secretary of Labor brought this action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, et seq., against the defendant, Local 1402, International Longshoremen's Association of Tampa, Florida and Vicinity, AFL-CIO (Union), to set aside the Union's December 9, 1975, election of officers. The Union's bylaw provides, as an eligibility requirement for election of officers, that a member must have attended, or been excused from, at least one of the regular meetings in each of the twelve months prior to nomination.[1] Two such meetings were held each

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[1] All members were automatically credited with attendance in the first two months of the twelve-month period relevant

month. The excuse provisions were liberal, requiring no reason for the absence; a member must simply notify the Union office in advance of a scheduled meeting in order to obtain an excused absence. Pursuant to this eligibility provision, only 6.3% of the Union members were eligible; 93.7% were not.

The district court granted the Union's motion for summary judgment, holding that the eligibility requirement was reasonable and thus permitted under § 401(e) of the Act, 29 U.S.C. § 481(e). The Secretary timely filed his notice of appeal. We reverse.

The sole issue before us is whether the eligibility requirement violates § 401(e) of the Act, 29 U.S.C. § 481(e), which provides:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant

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in this case. Therefore, the parties tried this case assuming that the eligibility requirement was to attend at least one of the regular meetings in each of the ten months prior to nomination.

> to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

The Supreme Court has held that the statute was designed to guarantee free and democratic union elections similar to the model of our political elections, and that the permitted "reasonable qualifications" on eligibility to hold office were intended to have only a narrow reach. *Steelworkers* v. *Usery*, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977); *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968).

Steelworkers involved a challenge to a union bylaw setting eligibility requirements for union office holders. Members had to attend at least one-half of the union meetings for three years prior to the election. Meetings were held once a month. Thus, if a union member had attended no meetings at all for the first eighteen months of the relevant three-year period, he would have to attend each meeting for the last eighteen months. Ninety-six and one-half percent of the members failed to meet the eligibility requirements. The Supreme Court held that the antidemocratic effects of the eligibility requirement outweighed the interests urged in its support, emphasizing that "an attendance requirement that results in the

exclusion of 96.5% of the members from candidacy for union office hardly seems to be a 'reasonable qualification' consistent with the goal of free and democratic elections. A requirement having that result obviously severely restricts the free choice of the membership in selecting its leaders." *Id.* 429 U.S. at 310, 97 S.Ct. at 615.

The Union attempts to escape the controlling effect of the *Steelworkers* case by pointing to two distinctions: first, that the *Steelworkers* rule provided for only very limited excused absences, whereas the instant rule provides liberally for excused absences; and second, that the *Steelworkers* rule required the formulation of an intention to run for office eighteen months prior to the election, whereas the instant rule requires only ten months advance intention.[2]

The Union argues that the instant rule places only a minimal burden upon Union members, because of the liberal excuse provisions. A member need only call the Union office prior to a meeting. He need give no reason for his inability to attend. We agree that the burden thus imposed on Union members is slight indeed. However, we note that the same argument was rejected in the *Steelworkers* case. The Supreme Court stated: "[T]his argument misconceives the evil at which the statute aims. We must judge the eligibility rule not by the burden it imposes on the individual candidate, but by its effect on free and democratic processes of union government." 429 U.S. at 310-311, n.6, 97 S.Ct. at 615.

The Union argues that the liberal excuse provisions here make it considerably easier in this case, as compared to *Steelworkers*, to meet the eligibility requirements. This we acknowledge. A member who merely calls in before

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[2] The district court concluded that these two factors adequately distinguished *Steelworkers* from the case at hand. We disagree.

each meeting will meet the eligibility requirements without ever having attended a single meeting. Rather than adding strength to the Union's case, however, this undermines the only legitimate purposes that have been asserted on behalf of the Union's bylaw; *i.e.*, that the rule encourages attendance and insures nominees who will have at least minimal awareness and interest in the activities of the Union. The only purposes for the rule having evaporated, we are left with a rule which serves no demonstrable purpose, but which, on the other hand, significantly limits eligible candidates and imposes a substantial adverse effect on the democratic process.[3]

As the second factor distinguishing the instant case from *Steelworkers*, the Union points to the fact that a potential candidate in *Steelworkers* had to formulate his intention to seek election eighteen months in advance, whereas only a ten-month advance intention is necessary in the instant case. We acknowledge that ten months is substantially less than eighteen months.[4] The Supreme

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[3] The First Circuit rejected a similar argument with respect to a more liberal "excuse" provision, permitting a member to mail a post card within a week after a meeting to obtain attendance credit. *Usery* v. *Local Division 1205, Amalgamated Transit Union*, 545 F.2d 1300 (1st Cir. 1976). The First Circuit noted that such bylaw served little purpose other than to screen out those who had not decided to run for office soon enough to meet the attendance requirement. *Id.* at 1304, n.3.

[4] Reflection suggests that the difference between the ten-month requirement in the instant case and the eighteen-month rquirement in *Steelworkers* is not as substantial as would appear at first glance. Unlike the rule in this case, the *Steelworkers* rule would permit any meetings attended by a union member during the first eighteen months of the relevant three-year period to be credited against the number of meetings which must be attended during the last eighteen months. For example, if a member had attended five meetings during the first eighteen months of the relevant three-year period, he

Court in *Steelworkers* was concerned about the eighteen-month requirement because election issues and membership interest in changing union leadership would likely emerge only shortly before elections. The Supreme Court reasoned that the advance-intention requirement would eliminate potential candidates whose interest in running was aroused too late to comply with the qualifying procedures. The same concern is operative in this case; election issues and membership interest in ousting Union leadership might well be aroused after the ten-month deadline.[5]

We conclude that the rationale of the *Steelworkers* case controls the decision in this case. On the particular facts of this case, where the legitimate purposes served by the rule are weak at best, where a potential candidate

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would need to attend only thirteen meetings in the last eighteen months. On the other hand, a member in the instant case must attend at least one of the two meetings in each of the ten months preceding the election. Good attendance prior to the relevant ten-month period would be of no benefit. Moreover, in the instant case, a union member who missed, and was not excused from, both meetings in any single month during the relevant ten-month period would be disqualified.

[5] The Union also argues that the emphasis placed upon the actual antidemocratic impact of the rule places the Union in the unfortunate position of not being able to predict, with any degree of certainty, whether or not a particular requirement will be valid under the statute. The short answer to this contention is that the same argument was made and rejected in *Steelworkers, supra*, 429 U.S. at 314, n.9, 97 S.Ct. at 617. The Supreme Court suggested that it should have been obvious to the *Steelworkers* union that the rule would have a significant antidemocratic impact. Similarly, in this case, it should have been obvious to the Union that its rule was having a substantial antidemocratic effect. Moreover, the weakness of the asserted legitimate purposes for this rule should have forewarned the Union.

must formulate his intention to run ten months in advance of the election, and where the impact of the rule is to render ineligible 93.7% of the union membership, we hold that the "antidemocratic effects of the meeting-attendance rule outweigh the interests urged in its support." 429 U.S. at 310, 97 S.Ct. at 615.

We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 76-413 Civ-T-H

[Filed Tampa, Fla., Apr. 19, 1978—
Wesley R. Thies, Clerk]

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

— vs —

LOCAL 1402, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION OF TAMPA, FLORIDA AND VICINITY, AFL-CIO,
Defendant.

FINAL JUDGMENT

This cause came on for consideration upon Defendant's oral motion for summary judgment made at the pre-trial conference on March 29, 1978, and predicated upon the stipulated facts recited in the Pre-Trial Stipulation of the parties. At that time the Court reversed ruling on the motion pending submission of memoranda by counsel.

This action was instituted by the Secretary of the United States Department of Labor pursuant to Title IV of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, and alleges that Defendant violated section 401(e) of that Act. (29 USC § 481 (e)). Specifically, Plaintiff claims that Defendant denied its members in good standing the right to be candidates for union office by imposing, with respect to the election held December 9, 1975, an unreasonable candidate qualification requirement. The rule in question required attendance at one of two regular meetings per month for

twelve consecutive months prior to the officer nomination meeting. The parties agree that this qualification rendered 93% of Defendant's members ineligible for candidacy at the December, 1975 election, but there is no dispute that a member would be excused from attendance by merely informing the union president, office clerk, or financial secretary that he wished to be excused. The member need not have stated a reason for such excuse, and an excused absence was counted as attendance for purposes of candidate eligibility.

In its motion for summary judgment, Defendant contends that the qualification is reasonable as a matter of law. Plaintiff, on the other hand, relying upon *Local 3489, United Steelworkers of America, AFL-CIO* v. *Usery*, 429 U.S. 305, 97 S.Ct. 611 (1977), claims that candidacy qualification requirements such as Defendant's, which render 93% of a union's membership ineligible to hold office, are unreasonable.

Upon consideration of the memoranda and authorities cited by counsel, the Court is of the opinion that Defendant's candidacy requirements are not unreasonable as a matter of law. The rule serves the legitimate purposes of encouraging attendance at meetings and, more importantly, of insuring that nominees will be those who have demonstrated at least a minimal awareness of and interest in the activities of the organization. This case is distinguishable from *Steelworkers, Local 3489, supra*, in that: (1) The Steelworkers' rule made no apparent provision for excused absence with the exception of work schedule conflicts, whereas Defendant's rule allows excused absences upon the mere giving of notice to designated officers;* (2) The Steelworkers' rule effectively required an opposition candidate to formulate an intention to run for office (and meet the requirements for eligibil-

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* See 29 C.F.R. 452.38.

ity by regularly attending meetings) at least eighteen months in advance of the election whereas, in this instance, that decision could have been made as late as ten months preceding the election. (Attendance for November and December 1974 was credited to all members).

Accordingly, Defendant's motion for summary judgment is GRANTED, and the Clerk is directed to enter judgment for the Defendant.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 19th day of April, 1978.

/s/ [Illegible]
United States District Judge

FULL TEXT OF 29 U.S.C. §§ 481 and 482

§ 481 Terms of office and election procedures

Officers of national or international labor organizations; manner of election

(a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

Officers of local labor organizations; manner of election

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

Requests for distribution of campaign literature; civil action for enforcement; jurisdiction; inspection of membership lists; adequate safeguards to insure fair election

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or other-

wise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

Officers of intermediate bodies; manner of election

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and

shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

Election of officers by convention of delegates; manner of conducting convention; preservation of records

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this subchapter. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

Use of dues, assessments or similar levies, and funds of employer for promotion of candidacy of person

(g) No moneys received by any labor organization by ways of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

Removal of officers guilty of serious misconduct

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act [1] that the constitution and bylaws of such labor organization do not provide an adequate procedure of the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this subchapter.

Rules and regulations for determining adequacy of removal procedures

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h) of this section.

§ 482. Enforcement

Filing of complaint; presumption of validity of challenged election

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 481 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

Review of orders; stay of order directing election

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

PROVISIONS OF 29 CFR AS OF JULY 1, 1976

§ 452.36 Reasonableness of qualifications.

(a) The question of whether a qualification is reasonable is a matter which is not susceptible of precise definition, and will ordinarily turn on the facts in each case. However, court decisions in deciding particular cases have furnished some general guidelines. The Supreme Court in Wirtz v. Hotel, Motel and Club Employees Union, Local 6, 391 U.S. 492 at 499 (1968) held that

> Congress plainly did not intend that the authorization in section 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that 'every member in good standing shall be eligible to be a candidate and to hold office * * *.' This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents.

Union qualifications for office should not be based on assumptions that certain experience or qualifications are necessary. Rather it must be assumed that the labor organization members will exercise common sense and judgment in casting their ballots. "Congress' model of democratic elections was political elections in this country" (Wirtz v. Local 6, 391 U.S. at 502) and a qualification may not be required without a showing that citizens assumed to make discriminating judgments in public elections cannot be relied on to make such judgments when voting as union members.

(b) Some factors to be considered, therefore, in assessing the reasonableness of a qualification for union office are:

(1) The relationship of the qualification to the legitimate needs and interests of the union;

(2) The relationship of the qualification to the demands of union office;

(3) The impact of the qualification, in the light of the Congressional purpose of fostering the broadest possible participation in union affairs;

(4) A comparison of the particular qualification with the requirements for holding office generally prescribed by other labor organizations; and

(5) The degree of difficulty in meeting a qualification by union members.

452.38 Meeting attendance requirements.

(a) It may be reasonable for a labor organization to establish a requirement of attendance at a specified number of its regular meetings during the period immediately preceding an election, in order to insure that candidates have a demonstrated interest in and familiarity with the affairs of the organization. In the past, it was ordinarily considered reasonable to require attendance at no more than 50 percent of the meetings over a period not exceeding two years. Experience has demonstrated that it is not feasible to establish arbitrary guidelines for judging the reasonableness of such a qualification. Its reasonableness must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which must be attended and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings,

and the impact of the rule, i.e., the number or percentage of members who would be rendered ineligible by its application.[23]

(b) Some guidance is furnished by court decisions which have held particular meeting attendance requirements to be unreasonable under the following circumstances: one meeting during each quarter for the three years preceding nomination, where the effect was to disqualify 99 percent of the membership (Wirtz v. Independent Workers Union of Florida, 65 LRRM 2104, 55 L.C. ¶ 11,857 (M.D. Fla. 1967)); 75 percent of the meetings held over a two-year period, with absence excused only for work or illness, where over 97 percent of the members were ineligible (Wirtz v. Local 153, Glass Bottle Blowers Ass'n., 244 F.Supp. 745 (W.D. Pa. 1965), order vacating decision as moot, 372 F.2d 86 (C.A. 3 1966), reversed 389 U.S. 463; decision on remand, 405 F.2d 176 (C.A. 3 1968)); Wirtz v. Local 262, Glass Bottle Blowers Ass'n., 290 F.Supp. 965 (N.D. Calif., 1968); attendance at each of eight meetings in the two months between nomination and election, where the meetings were held at widely scattered locations within the state (Hodgson v. Local Union No. 624 A-B, International Union of Operating Engineers, 80 LRRM 3049, 68 L.C. ¶ 12,816 (S.D. Miss. Feb. 19, 1972)).

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[23] Cf. Wirtz v. Hotel, Motel and Club Employees Union, Local 6, 391 U.S. 492, at 502; "Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly claim to be a 'reasonable qualification.'"

PROVISION OF 29 CFR § 452.38 AS OF JULY 1, 1979

§ 452.38 Meeting attendance requirements.

(a) It may be reasonable for a labor organization to establish a requirement of attendance at a specified number of its regular meetings during the period immediately preceding an election, in order to insure that candidates have a demonstrated interest in and familiarity with the affairs of the organization. In the past, it was ordinarily considered reasonable to require attendance at no more than 50 percent of the meetings over a period not exceeding two years. Experience has demonstrated that it is not feasible to establish arbitrary guidelines for judging the reasonableness of such a qualification. Its reasonableness must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which must be attended and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, i.e., the number of percentage of members who would be rendered ineligible by its application.[25]

(a-1) In *Steelworkers, Local 3489* v. *Usery*, 429 U.S. 305, 94 LRRM 2203, 79 L.C. ¶ 11,806 (1977), the Supreme Court found that this standard for determining validity of meeting attendance qualifications was the type of flexible result that Congress contemplated when it used the word "reasonable." The Court concluded that Congress, in guaranteeing every union member the opportunity to hold office, subject only to "reasonable qualifica-

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[25] Cf. Wirtz v. Hotel, Motel and Club Employees Union, Local 6, 391 U.S. 492, at 502: "Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly claim to be a 'reasonable qualification.' "

tions," disabled unions from establishing eligibility qualifications as sharply restrictive of the openness of the union political process as the Steelworkers' attendance rule. The rule required attendance at fifty percent of the meetings for three years preceding the election unless prevented by union activities or working hours, with the result that 96.5 percent of the members were ineligible.

(b) Other guidance is furnished by lower court decisions which have held particular meeting attendance requirements to be unreasonable under the following circumstances: One meeting during each quarter for the three years preceding nomination, where the effect was to disqualify 99 percent of the membership (*Wirtz* v. *Independent Workers Union of Florida*, 65 LRRM 2104, 55 L.C. par. 11,857 (M.D. Fla., 1967)); 75 percent of the meetings held over a two-year period, with absence excused only for work or illness, where over 97 percent of the members were ineligible (*Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 244 F. Supp. 745 (W.D. Pa., 1965), order vacating decision as moot, 372 F. 2d 86 (C.A. 3 1966), reversed 389 U.S. 463; decision on remand, 405 F.2d 176 (C.A. 3 1968)); *Wirtz* v. *Local 262, Glass Bottle Blowers Ass'n.*, 290 F. Supp. 965 (N.D. Cal., 1968)); attendance at each of eight meetings in the two months between nomination and election, where the meetings were held at widely scattered locations within the state (*Hodgson* v. *Local Union No. 624 A-B, International Union of Operating Engineers*, 80 LRRM 3049, 68 L.C. par. 12,816 (S.D. Miss. Feb. 19, 1972)); attendance at not less than six regular meetings each year during the twenty-four months prior to an election which has the effect of requiring attendance for a period that must begin no later than eighteen months before a biennial election (*Usery* v. *Local Division 1205, Amalgamated Transit Union*, 545 F. 2d 1300 (C.A. 1, 1976)).

PORTIONS OF THE BY-LAWS OF LOCAL 1402, I.L.A.

As Amended May 9, 1972

ARTICLE IX

Eligibility For Office

1. To be eligible for nomination or election to any office in this organization a member must meet the following requirements:

(a) He must be a citizen of the United States.

(b) He must have been a member in continuous good standing for a period of one year prior to his nomination.

(c) He must have had a total of one year's experience aboard and alongside ship.

(d) He must not have been convicted of or served any part term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury or a violation of Title II or III of the Labor-Management Reporting and Disclosure Act of 1959, or conspiracy to commit any of such crimes, for five years prior to the date of his nomination, unless

(1) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or

(2) the Board of Parole of the United States Department of Justice determines that such person's service as an officer would not be contrary to the purposes of the Labor-

Management Reporting and Disclosure Act of 1959.

(e) He must have been in attendance or excused at at least one of the regular meeting in each of the twelve months prior to his nomination.

(f) He must demonstrate a facility to read, speak and understand the English language, equivalent to that normally associated with a High School education.

2. No member whose dues have been withheld by his employer for payment to the Local pursuant to the member's voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to be a candidate in the Local by reason of alleged delay or default in the payment of dues.

ARTICLE XX

By-Laws

1. These By-Laws may be revised at any regular meeting or special meeting called for that purpose.

2. The proposed amendment or amendments shall be in writing and shall be read at two meetings before a vote is taken. The two meetings may include the meeting at which the vote is taken. A majority vote shall be sufficient to amend these By-Laws.

3. All such votes shall be by secret ballot.

Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-6

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOCAL 1402, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PETITIONER

v.

F. RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

QUESTION PRESENTED

Whether a local union rule requiring that members attend or be excused from attendance at one regular meeting in each of the twelve months prior to nomination, which precludes 93.7% of the local's members from seeking office but serves none of the rule's asserted purposes, is a "reasonable qualification" for election to union office under Section 401(e) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 481(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 617 F. 2d 96. The opinion of the district court (Pet. App. 8a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1980. The petition for a writ of certiorari was filed on July 3, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

The Secretary of Labor brought this action under Section 402(b) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 482(b), to set aside the December 1975 election conducted by petitioner, a local labor organization chartered by the International Longshoremen's Association, AFL-CIO. That election was conducted pursuant to petitioner's by-laws, which provide that a member is ineligible for nomination or election to any local office unless he has attended, or has been excused from attending, at least one regular meeting in each of the 12 months before nomination (Pet. 3).[1] To secure an excused absence, a member need only give prior notice to the local that he will not be present; he need not give any reason for his absence (*ibid.*). It is possible, therefore, that a member may satisfy the attendance requirement without ever having been present at a

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[1]During the relevant time period (November 1974 through October 1975) two meetings were held each month except in November and December 1974; all members were automatically credited with attendance for those two months. The case was therefore litigated below with the understanding that members were required to attend or be excused from attending one of the two meetings each month for ten months prior to nominations.

meeting. During the relevant period, however, the attendance requirement precluded 93.7% of petitioner's members from seeking office.

The Secretary of Labor alleged that petitioner's attendance requirement violated Section 401(e) of the Act, 29 U.S.C. 481(e), which requires that "every member in good standing shall be eligible to be a candidate and to hold office (subject * * * to reasonable qualifications uniformly imposed) * * *." The district court entered summary judgment for petitioner, holding that the attendance rule was not unreasonable as a matter of law, because it encouraged attendance at meetings and insured that candidates for office would have at least a minimal interest in union activities (Pet. App. 9a).

The court of appeals reversed, relying on this Court's decision in *Local 3489, United Steelworkers of America* v. *Usery*, 429 U.S. 305 (1977). Because the rule serves purposes that are "weak at best," while disqualifying 93.7% of the local membership and requiring members to decide whether to be candidates ten months before the election, the court of appeals concluded that the "antidemocratic effects of the meeting-attendance rule outweigh the interests urged in its support" (Pet. App. 6a-7a, quoting *Local 3489, Steelworkers* v. *Usery*, *supra*, 429 U.S. at 310).

ARGUMENT

The court of appeals correctly applied this Court's decision in *Steelworkers*. The decision below conflicts with no decision of any other court of appeals and warrants no further review.

1. In *Steelworkers*, this Court considered whether a rule that required attendance at a minimum of 18 monthly meetings over a three-year period, and thereby disqualified approximately 96.5% of the membership, was a

reasonable qualification for local union office under Section 401(e) of the Act, 29 U.S.C. 481(e). The Court noted that the reasonableness of such requirements must "be measured in terms of [their] consistency with the Act's command to unions to conduct 'free and democratic' union elections." *Local 3489, Steelworkers* v. *Usery*, *supra*, 429 U.S. at 309, quoting *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968).

This Court concluded that the *Steelworkers* attendance requirement was not reasonable for three reasons. First, "an attendance requirement that results in the exclusion of 96.5% of the members from candidacy for union office hardly seems to be a 'reasonable qualification' consistent with the goal of free and democratic elections" (429 U.S. at 310). Second, the rule impeded union democracy by requiring members to decide whether to become candidates for union office at least 18 months before the election, when issues may not have crystallized sufficiently to make an informed decision. As the Court noted, a rule requiring a member to decide whether to be a candidate so far in advance of the election "when no issues exist to prompt that decision may * * * discourage candidacies and to that extent impair the general membership's freedom to oust incumbents in favor of new leadership" (429 U.S. at 311). Finally, the Court found that the rule's purported purposes of encouraging attendance and limiting election to candidates who had demonstrated an interest in union activities did not make the requirement reasonable because "the rule has plainly not served these goals" (429 U.S. at 312).

2. The court of appeals correctly found (Pet. App. 4a-6a) that petitioner's attendance rule is indistinguishable from that which this Court struck down in *Steelworkers*. As in *Steelworkers*, petitioner's rule requires that a member decide whether to become a candidate many

months in advance of an election[2] and disqualifies the bulk of the membership—in this case, 93.7%—from seeking union office.[3] As in *Steelworkers*, petitioner's attendance rule purportedly serves the purpose of encouraging attendance and ensuring that candidates have some interest in union activities, but it cannot be justified on that ground. Petitioner's rule obviously has not encouraged attendance at union meetings and, by precluding 93.7% of the membership from seeking union office, it cannot be said to have fostered participation in union affairs. Furthermore, as the court of appeals noted

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[2]As the court of appeals stated (Pet. App. 5a-6a), the principle that union members should not be required to decide far in advance of an election whether they will be candidates applies equally whether that decision must be made 12 months before an election (as the rule here requires), 10 months before an election (as the rule here was applied), or 18 months before the election (as in *Steelworkers*). Furthermore, as the court of appeals also noted (Pet. App. 5a-6a n.4), petitioner's rule may actually be more stringent than that which the Court invalidated in *Steelworkers*. In *Steelworkers*, a member would have had to attend only 13 meetings in the last 18 months if he had attended five meetings in the first 18 months. Under petitioner's rule, a member would be disqualified from seeking local office if he had failed to attend, or secure an excused absence, in only one month during the 10-month period preceding the election.

[3]Contrary to petitioner's contention (Pet. 4-6), the Secretary did not urge, and the court of appeals did not adopt, a *per se* rule requiring the invalidation of a meeting attendance rule whenever the rule bars a large percentage of the membership from seeking office. The fact that 93.7% of petitioner's membership cannot seek union office was one of several factors that the court properly considered in reaching its decision. This Court has looked with disfavor on candidacy eligibility requirements that exclude a large percentage of the membership from seeking office. *Local 3489, Steelworkers* v. *Usery*, *supra*, 429 U.S. at 310; *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, *supra*, 391 U.S. at 502. Moreover, the Secretary's interpretative regulation, treating the percentage of the membership disqualified by an attendance rule as one of several factors to be considered (29 C.F.R. 452.38; Pet. App. 20a), was cited with approval in *Steelworkers* (429 U.S. at 313).

(Pet. App. 4a-5a), the liberal "excuse" provisions of petitioner's rule actually undermine the alleged aims put forth in support of the rule because a member can satisfy the attendance requirement without attending a single meeting.[4]

In sum, petitioner's attendance rule produced the very antidemocratic effects identified in *Steelworkers*, without serving any legitimate purpose. For these reasons, the court of appeals correctly held that this Court's decision in *Steelworkers* was controlling here.[5]

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[4]While compliance with the rule may not be difficult, "this argument misconcieves the evil at which the statute aims." *Local 3489, Steelworkers* v. *Usery*, *supra*, 429 U.S. at 310 n.6. Eligibility rules are not to be judged solely by the burden they place on individual members, but also by their "effect on free and democratic processes of union government." *Id.* at 310-311 n.6.

[5]As the court of appeals correctly noted (Pet. App. 6), petitioner's contention (Pet. 10-11) that the decision below precludes any prediction whether a particular rule is reasonable under Section 401(e) of the Act was rejected by this Court in *Steelworkers*. See 429 U.S. at 314 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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